

FEDERAL PUBLIC DEFENDER

NORTHERN DISTRICT OF TEXAS

FEDERAL PUBLIC DEFENDER:
RICHARD ANDERSON

525 GRIFFIN STREET
SUITE 629
DALLAS, TX 75202

PHONE 214-767-2746
FAX 214-767-2886

ASSISTANT FEDERAL PUBLIC
DEFENDERS.

CHARLES M. BLEH
LAURA S. HARPER
JASON D. HAWKINS
CARLTON M. LARTY
DOUGLAS A. MORRIS
JOHN M. NICHOLSON
SAM L. OGAN
JOEL PAGE

RESEARCH & WRITING
ATTORNEY:
WILLIAM BIGGS

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08-CR-007

Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Comment on Proposed Amendments to Rule 15 of the Federal Rules of Criminal Procedure

Dear Mr. McCabe:

This letter provides public comment on behalf of the Federal Public and Community Defenders on the proposed amendments to Rule 15 of the Federal Rules of Criminal Procedure¹

In promulgating rules of procedure, courts must ensure that they are “not inconsistent with the statutes or Constitution of the United States.” *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941); *cf.* 28 U.S.C. § 2072 (Supreme Court has power to prescribe general rules of practice and procedure, which “shall not abridge, enlarge or modify any substantive right”). The proposed amendment to Rule 15 seeks to preserve testimonial evidence, obtained in the absence of the defendant, if the testimony “could provide substantial proof of a material fact,” presumably for use at trial if the witness remains unavailable. Such an aim is of doubtful constitutionality, as it strikes at the core of the Confrontation Clause, by denying the right to face-to-face confrontation. The rule also threatens, as a practical matter, to significantly impair the defense function, which relies on the defendant’s presence with counsel when confronting and cross-examining a witness. In light of these constitutional doubts and practical problems, we urge the Committee to withdraw the proposed amendment, even accepting the government’s view that the proposed rule is necessary for the prosecution of important transnational crimes. Alternatively, we suggest that

¹ By separate letter, we have previously provided comment on proposed amendments to Rules 5, 12.3, 21, and 32.1.

the Committee amend the proposed rule to narrow its scope, ensuring that it is utilized only when there is no reasonable alternative to a deposition in the defendant's absence, and when the government demonstrates that the deposition will truly serve important public policy interests beyond the mere prosecution of an individual crime.

I. The Proposed Rule Is of Doubtful Constitutionality

The proposed rule amendment contemplates taking testimony—testimony that will be presumably offered at trial—outside the defendant's presence and without the defendant's consent. This denial of face-to-face confrontation raises serious constitutional questions that are not addressed by the proposed rule's provisions.

The Supreme Court has long recognized that the Sixth Amendment's Confrontation Clause "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988) (citations omitted) (tracing the right back to Roman law); *see also Maryland v. Craig*, 497 U.S. 836, 845-47 (1990).² Such confrontation of adverse witnesses is an "essential" component of a fair trial. *Coy*, 487 U.S. at 1019-20. A witness may be less likely to lie about the defendant if he must do so in front of the defendant. *Coy*, 487 U.S. at 1019-20. And, if the defendant knows the witness, as is often the case, the defendant may be able to pick up on nonverbal cues to assist counsel in formulating questions for cross examination and making a record regarding the witness's demeanor. *Cf Coy*, 487 U.S. at 1019-20 (witness may "studiously look elsewhere," but trier of fact can draw conclusions from that fact). For these reasons, the "explicit" right to face-to-face confrontation is a distinct constitutional guarantee from that of cross-examination, though it serves much the same purpose. *Coy*, 487 U.S. at 1019-20.

In *Craig*, the Supreme Court permitted the government to avoid its obligation to provide face-to-face confrontation only when doing so (1) was "necessary to further important public policy"

² Blackstone saw face-to-face confrontation as an essential right.

This open examination of witnesses viva voce, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken.

2 William Blackstone, Commentaries on the Laws of England 373-74, *quoted in* Natalie Kijurna, *Lilly v. Virginia: the Confrontation Clause and Hearsay--"Oh What a Tangled Web We Weave . . ."*, 50 DEPAUL L. REV. 1133, 1144 & n.67 (2001).

and (2) “only when the reliability of the testimony [was] otherwise assured.” *Craig*, 497 U.S. at 850.³ Subsequent to *Craig*, however, the Court has abandoned precedent upon which it was based, emphasizing that the touchstone of the Sixth Amendment is the right to actual confrontation of one’s accusers, not reliability. Given this significant development in the Court’s precedent, *Craig* provides a doubtful basis upon which to draft a rule denying confrontation rights.

Craig was a five-to-four decision, from which Justice Scalia, the author of *Coy*, dissented. The *Craig* majority opined that the “central concern of the Confrontation Clause is to ensure the reliability of evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” 497 U.S. at 845. Although it recognized that “face-to-face confrontation forms ‘the core of values furthered by the Confrontation Clause,’” 497 U.S. at 846 (citation omitted), the Court, relying on *Ohio v. Roberts*, 448 U.S. 56 (1980), concluded that the Sixth Amendment right to confrontation was not absolute. Instead, it read its precedent merely as establishing a “preference” for face-to-face confrontation. 497 U.S. at 63.

Justice Scalia, joined by three members of the Court, sharply disagreed. His dissent emphasized that, contrary to the majority’s view, the text of the Sixth Amendment is absolute:

The Sixth Amendment provides with unmistakable clarity, that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant’s right to face his or her accusers in court.

497 U.S. at 860 (Scalia, J. joined by Brennan, Marshall, and Stevens JJ. dissenting). Setting forth reasoning that would later be adopted by a majority of the Court, Justice Scalia explained that the “Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was ‘face-to-face’ confrontation.” *Id.* at 862 (emphasis in original). He explained that a defendant’s right to confrontation at trial is not a “preference ‘reflected’ by the Confrontation Clause; it is a constitutional right unqualifiedly guaranteed.” *Id.* at 863. Justice Scalia was particularly concerned about the majority’s willingness to limit face-to-face confrontation because the witness herself was unwilling to testify in the presence of the defendant. After all, it is the requirement that the accuser look the defendant in the eye as she makes the accusation that is the essence of face-to-face confrontation. *Id.* at 866-67.

In *Crawford v. Washington*, 541 U.S. 36 (2004), a seven-member majority of the Court adopted the reasoning of the *Craig* dissent regarding the purpose of the confrontation right. Overruling *Roberts* with respect to testimonial statements,⁴ the Supreme Court held:

³ In that case, the Court permitted the one-way video testimony only because the trial court had made individualized findings that the child witnesses needed special protection. *Id.* at 845.

⁴ *Roberts* was subsequently overruled in toto. *Whorton v. Bockting*, 549 U.S. 406, ___, 127 S. Ct. 1173, 1182-83 (2007).

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." . . . To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

541 U.S. at 61.⁵ The Court added: "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Id.* at 62.

In light of the ruling in *Crawford*, the *Craig* majority's reliance on reliability as the basis for permitting denial of a defendant's right to confrontation appears no longer sound. It remains to be seen whether the Court will continue to balance important public policy concerns against what Justice Scalia described as the "absolute right" to confrontation. In any event, the proposed rule amendment does not even meet this standard. Nothing in the proposed rule limits its denial of confrontation to those cases in which it serves an important public policy. For this reason alone, the Committee should be extremely cautious in going forward the proposed amendment.

In its note to the proposed amendment, the Advisory Committee cites a number of circuit cases in support. It cites *United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998), *United States v. Gifford*, 892 F.2d 263, 264 (3d Cir. 1989), and *United States v. Salim*, 855 F.2d 944, 947 (2d Cir. 1988), as examples where courts have permitted foreign depositions in the defendant's absence. These cases cannot support the rule, at least not as proposed. All of the cited cases predate *Crawford*. The seminal case, *Salim*, predates *Craig* and relies on *Roberts* in concluding that the interrogatory procedure conducted in France was permissible. *Salim*, 855 F.2d at 954-55. It is inconceivable that the approved French procedure, under which both parties propounded interrogatories and neither the defendant nor defense counsel were present, would pass constitutional muster after *Crawford*.⁶

Medjuck provides better support for foreign depositions than *Salim*, but it likewise fails as a basis for the rule as proposed. In that case, the defendant was charged with participation in a "far-flung" conspiracy involving shipment and distribution of some 70 tons of hashish from Pakistan to Canada and the United States. 156 F.3d at 917. The Ninth Circuit allowed videotaped depositions

⁵ While *Crawford* concerned itself with the procedural right of cross-examination, the *Craig* dissent presented virtually identical reasoning regarding face-to-face confrontation. Indeed, Justice Scalia's dissent explained that cross-examination is simply an "implied and collateral right[]" to the explicit right of confrontation. 497 U.S. at 862.

⁶ In *Gifford*, the Third Circuit simply followed *Salim* in permitting depositions taken in Belgium.

taken in Canada where the trial court had applied *Craig* to require that the government demonstrate that it had diligently tried to secure the defendant's presence and a live video feed enabled the defendant to participate in the deposition. Significantly, it appears that the defendant himself did not wish to travel to Canada, where there was a outstanding warrant for his arrest. *Medjuck*, 156 F.3d at 920-21. *See also United States v Gigante*, 166 F.3d 75, 80-81 (2d Cir. 1999) (defendant's poor health prevented his attendance).

Contrary to *Craig*, *Medjuck* imposed no requirement that the deposition serve an important public purpose beyond the prosecution of an individual case. This renders it doubtful precedent upon which to premise an amendment to the proposed rule. In any event, the proposed rule in its current form is far less stringent than the procedure *Medjuck* approved, in that it requires government diligence neither in procuring the witness's testimony at trial nor in obtaining the defendant's presence at the deposition. (This issue is addressed further in part II of this comment). Accordingly, none of the cases cited in the Advisory Committee Note resolve doubts as to the constitutionality of the proposed rule, even if one assumes that *Craig* is still viable precedent after *Crawford*

Two post-*Crawford* circuit decisions have illustrated the problems raised by the proposed rule's approach to deposing government witnesses in a foreign country in the defendant's absence. In *United States v Yates*, 438 F.3d 1307 (11th Cir. 2006) (en banc), the Eleventh Circuit concluded that witness testimony presented on a television monitor at a criminal trial, by live, two-way video conference with witnesses in Australia, violated the defendants' Sixth Amendment right to confront the witnesses against them. 438 F.3d at 1315-18. Hewing to the standards set forth in *Craig*, the court of appeals emphasized that denial of face-to-face confrontation at trial is permissible only if "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id.* at 1312—14 (citing *Craig*, 497 U.S. at 850). The court noted that the current version of Rule 15 requires the defendant's presence precisely because of the need to satisfy the Constitution. *Id.* at 1314-15. The Eleventh Circuit recognized that the "simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation." *Id.* at 1315.

Because the trial court failed to conduct an evidentiary hearing to determine whether the video depositions served an important public policy interest and were sufficiently reliable, the Eleventh Circuit held that the trial court should not have permitted the introduction of the depositions at trial. *Yates*, 438 F.3d at 1316-17. Of significance to concerns raised by the proposed amendment to Rule 15, the Eleventh Circuit deemed inadequate the government's claim that the evidence was crucial to its case:

[T]here is no doubt that many criminal cases could be more expeditiously resolved were it unnecessary for witnesses to appear at trial. If we were to approve introduction of testimony in this manner, on this record, every prosecutor wishing to present testimony from a witness overseas would argue that providing crucial prosecution evidence and resolving the case expeditiously are important public policies that support the admission of two-way video conference.

438 F.3d at 1316. The Eleventh Circuit was willing to permit depositions taken in the defendant's

absence only in the “rare, exceptional case.” 438 F.3d at 1317.

Yates involved an otherwise typical conspiracy to distribute prescription drugs illegally and money laundering. In contrast, the Fourth Circuit affirmed a trial court’s decision to admit depositions of Saudi Arabian officials taken in Saudi Arabia in a defendant’s trial on charges of conspiracy to commit acts of terrorism. *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *petition for cert. filed*, 77 USLW 3242 (U.S. Oct. 6, 2008) (Nos. 06-4334 & 06-4521). Ali contended that his confession in Saudi Arabia had been obtained through torture. The government demonstrated that it had diligently attempted to secure the testimony of the foreign officials but the Saudi government would not permit them to attend the trial in the United States. In fact, this was the first time the Saudi government had permitted depositions at all. *Id.* at 539. As in *Medjuck*, the United States Marshal could not maintain custody of the defendant in Saudi Arabia, and, the defendant himself had reason not to travel there as he was subject to prosecution. Ali, 528 F.3d at 239. At oral argument, the government noted, without correction, that Ali had never asked to attend the depositions. *Id.* Instead, the two governments set up a live two-way video feed. Two defense attorneys attended the depositions in Saudi Arabia while a third stayed with the defendant, where the trial judge also presided. The depositions could be interrupted at any time for private telephone conversation with the defendant. *Id.* at 239–40.

In allowing the use of these depositions at trial, the Fourth Circuit emphasized that the case involved a potential threat to national security, i.e., one of the most critical public policy concerns. 528 F.3d at 240–41. Thus, Ali’s case contrasted sharply with the run of the mill money laundering and conspiracy charges faced by the defendants in *Yates*. Ali, 528 F.3d at 242 n.12. Nevertheless, the Fourth Circuit noted: “None of this diminishes the fact that face-to-face confrontation is a critical component of the defendant’s Sixth Amendment right.” *Id.* at 243. The Court of Appeals affirmed only because the case was “certainly unusual,” the officers were beyond the court’s subpoena power, and the defendant himself was not eager to travel to Saudi Arabia. *Id.*⁷

⁷ In a previous terrorism case, the Fourth Circuit authorized the defendant to use substitute exculpatory affidavits but noted that use of the affidavits by the government to bolster its case with inculpatory statements would violate the defendant’s Sixth Amendment right to confrontation. *United States v. Moussaoui*, 365 F.3d 292, 316 (4th Cir. 2004).

II. The Proposed Amendment to Rule 15 Is Overly Broad and Does Not Meet Even the Requisite Craig Standards

Assuming that, while limited, *Craig* has not been overruled, its remaining prong requires at a minimum a showing that denial of a defendant's right to confrontation is "necessary" to further an "important public policy." 497 U.S. at 850. The professed "important purpose" behind the proposed rule is to assist the United States in prosecuting "transnational" crimes. The rule is written so broadly, however, that it sweeps in prosecutions that cannot possibly satisfy this "important purpose." Nothing in the language of the proposed rule limits these depositions to "transnational cases," let alone cases of national or transnational significance. Nor does it impose any requirement about the severity of the offense. Instead, it authorizes depositions in all cases, even misdemeanor cases and cases that have little or no import beyond their own circumstances. If it is to justify denying face-to-face confrontation, a deposition's "important purpose" must be more than the government's desire to prosecute an individual crime. Otherwise, the proposed rule would threaten to swallow the standards of *Craig* and *Coy*. As the Eleventh Circuit has noted, "[a]ll criminal prosecutions include at least some evidence crucial to the government's case, and there is no doubt that many criminal cases could be more expeditiously resolved were it unnecessary for witnesses to appear at trial." *Yates*, 438 F.3d at 1316. This cannot be the basis for denial of the defendant's right to confront the witness. *Id.*

The proposed rule is overbroad for a second reason: it does not require a showing that the evidence sought is "necessary" to the government's case. As drafted, the rule permits depositions if the district court finds merely that the sought-after testimony "could" provide proof of a material fact. It does not require any showing that the witness is the only source of that proof. Without such a requirement, the rule would allow depositions out of the defendant's presence even though the government can obtain the same or similar proof from a different source without abridging the defendant's rights.

Finally, the proposed rule amendment fails confrontation requirements regarding witness unavailability to testify at trial. Out-of-court testimony may be admitted at trial consistently with the Sixth Amendment only if the defendant had an adequate opportunity to cross-examine the witness and the witness is unavailable to testify at trial. *Crawford*, 541 U.S. at 54. Before out-of-court testimony may be admitted at trial, the government must demonstrate that the witness is truly unavailable. *Barber v. Page*, 390 U.S. 719, 724-25 (1968). To make this showing, the government must make "good faith" attempts to secure the witness's presence. *Id.* This is clear even under the more-lenient standards in *Roberts*: if there is a "possibility, albeit remote, that affirmative measures might produce the declarant," the government must show that it would have been unreasonable to undertake those affirmative acts. 448 U.S. at 74.

Contrary to these requirements, the proposed rule imposes no obligation on the government to make any effort to secure the witness's presence. It requires only that the court find a substantial likelihood that the witness's attendance at trial cannot be obtained. The mere fact that a witness is not likely to be available does not fulfill the government's obligation to attempt to secure her presence. *Cf. United States v. Guadian-Salazar*, 824 F.2d 344, 346-47 (5th Cir. 1987) (reversing conviction for admission of depositions when government did not demonstrate sufficient efforts to

secure attendance of deported witnesses).

Because the proposed rule does not address the standards of the Confrontation Clause, it will result in avoidable litigation over the admissibility of testimony taken under questionable circumstances.⁸ This departs from the current rule, which, by guaranteeing the defendant's presence, avoids Sixth Amendment concerns. *See Yates*, 438 F.3d at 1317 (current Rule 15, which provides for defendants' presence at depositions, guarantees defendants' right to face-to-face confrontation); *see also Don v. Nix*, 886 F.2d 203, 206 (8th Cir. 1989) (Sixth Amendment guarantees defendant's presence at depositions), *cited in Yates*, 438 F.3d at 1317.

Preventing trial by deposition testimony was "the primary object" of the Confrontation Clause. *Mattox v. United States*, 156 U.S. 237, 242–43 (1895). Yet the rule contemplates the use of deposition testimony, without face-to-face confrontation, when doing so is not necessary to serve an important government interest, and even if the government has failed to make adequate efforts to bring the witness to the courtroom. To avoid the serious constitutional issues raised by permitting such depositions, we urge the Committee to reject the amended rule.

III. The Proposed Rule Will Impair the Defense Function

The importance of the defendant's presence at depositions is not limited to his Sixth Amendment right to face-to-face confrontation. The defendant is an integral component of the defense team. In many instances, there is no substitute for his contemporaneous participation in the deposition. This is shown by a number of cases in which foreign depositions have been used in which the defense was impaired by the defendant's absence or aided by the defendant's presence.

For example, attorneys in the Eastern District of Michigan represented a defendant in a multi-defendant case involving numerous charges of bank and wire fraud. Witnesses were deposed around the world, including in the Cayman Islands, Switzerland and London. While some defendants elected not to attend the depositions, the lead defendant was present, and her assistance was essential to effective cross-examination of the government witnesses. The case involved numerous documents in various languages, and the depositions took a number of days. Each evening, the defense team, including the defendant, pored over the documents and prepared for the next day's questioning. This would not have been possible to do over the telephone or through the use of other electronic communication.

It is no answer to this problem for the defense attorney to remain with his client and attend the deposition by alternate means. In a five-defendant case arising out of the Northern District of Texas, for example, the government took depositions of its witnesses in Malta. Four of the defendants were incarcerated, and the fifth was not permitted to leave the country, so none of the

⁸ For this reason, the Committee should not go forward on the theory that the proposed rule addresses only the taking of the deposition, not its use at trial. Indeed, in addressing past issues regarding the defendant's presence for deposition, the Committee has expressly addressed the later use of the depositions. Cf. FED. R. CRIM. P. 15(c)(2) (discussing not only taking deposition upon defendant's waiver of right to be present, but also using it).

defendants were present at the depositions. Defense attorneys remained with their clients at the detention facility in Texas and were forced to participate by video or telephone. The video feed was sporadic, the sound was abysmal, and the secure telephone line worked only intermittently. Such procedures were not a substitute for face-to-face confrontation.

IV. If Endorsed, the Current Proposal Should Be Amended to Limit Its Scope

If the Committee should decide to endorse an amendment to Rule 15 despite its doubtful constitutionality and its detrimental impact on the defense, we suggest that changes be made to limit the scope of the rule, so that depositions are taken in the defendant's absence only when truly necessary and when truly in the national interest. Such changes may increase the chance the proposed amendment will be accepted by the Supreme Court and Congress.

The changes we propose are set out in a blacklined revision of the rule, attached to this letter. They include:

(1) adding a requirement that the Attorney General or his designee authorize the deposition. Such an authorization is familiar to the courts and federal criminal litigants; it would put the deposition on the same footing as an interception of wire communications, or a government sentencing appeal.

(2) requiring the court to find not only that the foreign witness will provide material testimony, but also that no other witness could provide sufficiently similar proof at trial or at a deposition in the United States; and

(3) requiring not only that the defendant be able to participate in the deposition, but also that the means of participation are the least restrictive means reasonably available.

In addition to the changes noted above, the redline removes some awkward language and clarifies a few points of ambiguity. Each proposed change is explained by the notes that follow.

Finally, the proposed language below limits the taking of foreign depositions in the defendant's absence to government witnesses. The Criminal Rules Subcommittee had discussed the use of the proposed rule by codefendants, but we suggest that such a rule would be unnecessary, given the alternative means available to address the problem (e.g., limiting instructions, severance, etc.)

We appreciate the opportunity to comment on this proposed amendment to Rule 15. We respectfully urge the Committee to withdraw the proposed amendment, or instead to adopt our proposed alternative

Very truly yours,

Richard A. Anderson
Federal Public Defender

DEFENDERS' PROPOSED ALTERNATIVE AMENDMENT [Redline]

(c) Defendant's Presence.

- (1) *Defendant in Custody.* Except as authorized by subsection (3) of this section,¹ [t]he officer who has custody of the defendant must produce the defendant at the deposition ~~in the United States~~ and keep the defendant in the witness's presence during the examination, unless the defendant:
 - (A) waives in writing the right to be present; or
 - (B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.
- (2) *Defendant Not in Custody.* Except as authorized by subsection (3) of this section, [a] defendant who is not in custody has the right upon request to be present at the deposition ~~in the United States~~, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant - absent good cause - waives the right to appear and any objection to the taking and use of the deposition based on that right.
- (3) *Taking Deposition of government² Witness Outside the United States Without the Defendant's Presence* The deposition of a government witness who is outside the United States may be taken without the defendant's presence if:
 - (A) the Attorney General or his designee certifies that the deposition will provide necessary evidence as to a federal felony offense, the prosecution of which advances important public policy interests;³
 - (B) the court makes case-specific findings ~~of all of the following~~ that:
 - ~~(A)~~(i) there is a substantial likelihood that the witness's testimony ~~could~~ will provide substantial proof of a material fact;
 - (ii) no other government witness is likely to provide similar proof at trial or at a deposition in the United States;⁴
 - ~~(B)~~(iii) there is a substantial likelihood that the witness's attendance at trial cannot be obtained through diligent efforts;⁵
 - ~~(C)~~(iv) the witness's presence for a deposition in the United States

cannot be obtained through diligent efforts; and

(v) Despite the diligent efforts of the government, the

defendant cannot be present for one of the following reasons:

~~(i)~~(I) the country where the witness is located will not permit the defendant to attend the deposition;

~~(ii)~~(II) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

~~(iii)~~(III) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

~~(E)~~(C) the defendant ~~can~~ meaningfully participates in the deposition, ~~through reasonable means~~ and the limits placed on participation are the least restrictive means reasonably available.⁶

NOTES

1. In subsections (1) and (2), the underlined language replaces “in the United States,” which is stricken as awkward. As drafted, the amendment would mean that a defendant who was disruptive in a foreign country would not waive his right to be present at the deposition.

2. New subsection (3) is limited to government witnesses; the problem of codefendant witnesses is not widespread enough to require special treatment by the rule, especially given the possible alternatives of limiting instructions and severance of counts or defendants.

3. The requirement that the deposition advance an important public policy interest is taken directly from *Maryland v. Craig*. See 497 U.S. 837, 850 (1990). See also Order of the Supreme Court, 207 F.R.D. 89, 93 (2002) (statement of Scalia, J.) (discussing Supreme Court's rejection of proposed rule 26). The language is framed to ensure that the policy interests in seeking a deposition is more than simply the interest in prosecuting any individual crime. Cf. *United States v. Yates*, 438 F.3d 1307, 1316 (11th Cir. 2006) (en banc) (in rejecting two-way video testimony, court of appeals notes that district court made no findings that the cases “was different from any other criminal prosecution in which the government would find it convenient to present testimony [in this manner]”).

Requiring specific authorization by the attorney general or his designee will help ensure that depositions are taken in the absence of the defendant only in the most important cases. Cf. 18 U.S.C. § 2516 (requiring attorney general authorization for wiretaps); 18 U.S.C. § 3742(a) (requiring attorney general authorization for sentencing appeals).

4. This provision makes clear that foreign depositions should be taken only when necessary to obtain testimony that would not otherwise be available.

5. Three provisions are amended to require that the government show good faith efforts to secure the witness for trial or U.S. deposition, and alternatively to allow the defendant to be present at the foreign deposition. *See, e.g.*, *United States v. Salim*, 855 F.2d 944, 950 (2d Cir. 1988) (allowing foreign deposition in defendant's absence "so long as the prosecution makes diligent efforts . . . to attempt to secure the defendant's presence"); *cf. Barber v. Page*, 390 U.S. 719, 724–25 (1968) (prosecution must make good faith effort to obtain witness's presence at trial).

6. Subsection (E) is promoted and rewritten to make clear that not only must the court find that reasonable means *can* be used to ensure the defendant's participation, but also that such means are *in fact used* at the deposition. The subsection was also amended to make clear that the means used must place the least reasonable restrictions on the defendant's participation.